IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 134.

COSMOPOLITAN MINING COMPANY,
Plaintiff in Error,
vs.
THOMAS F. WALSH,
Defendant in Error.

Inasmuch as defendant in error has made an objection to the allowance of the writ of error in this case, we have deemed it necessary to file a reply, and we shall endeavor to answer, as briefly as possible, only those arguments advanced in his brief that have not been anticipated and fully discussed in our original brief. We shall attempt to answer these arguments as nearly as possible in the order in which they have been made by defendant in error.

PRELIMINARY OBJECTION.

Defendant in error contends that the writ of error should be dismissed under rule 35 because the writ of error and citation were dated August 15th, 1902, while the assignment of errors was not filed until August 18th, 1902. Rule 11 of the Circuit Court of Appeals, and the decisions of that Court with respect thereto, are cited in support of this contention. The purpose of the rule is well stated by Judge Sanborn in France *vs.* Portland Gold M. Co., 108 Fed., 750, and which is quoted on page 7 of the brief of defendant in error. The

purpose is to give the Judge to whom the application is made knowledge of the alleged errors upon which the petitioner relies, so that it may be intelligently decided whether or not the prayer of the petition should be granted. In the case at bar the petition for the writ and the Judge's certificate that a constitutional question was involved, were filed on August 18th, 1902 (Folios 39 and 40), the same date as that upon which the assignment of errors was filed (Folio 48). Both the petition and certificate recite that the assignment of errors is annexed thereto, and the certificate is dated August 15th, 1902 (Folio 40), showing that the assignment of errors was submitted to the Judge with the petition, and that he had the opportunity to examine the same on August 15th, the date of the writ (Folio 196). The writ of error was also filed on August 18th, 1902. In any event the papers took effect when they were filed, and they were all filed on the same day, to wit, August 18th, 1902. The spirit, as well as the letter, of the rule *has been* complied with.

SERVICE IN THE COUNTY.

We do not contend that any of the actions in the controversy were brought in the wrong county, but we do contend that, having been brought in Ouray County, it was necessary to the jurisdiction of the Court that plaintiff in error should be served with process in the manner provided by the statutes of Colorado. If the Court was to render judgment in personam, then service must be made in accordance with Section 38, Subdiv. 9, of the Code. If the judgment was to be in rem, then property must be attached and service must be made by publication, as required by Section 41 of the Code. The service disclosed complied with neither statute, and, therefore, no valid judgment was rendered in personam or in rem.

The statutes giving corporations, both domestic and foreign, the same *rights*, and imposing the same *liabilities* as those enjoyed and borne by natural persons, have nothing to

do with the matter of *service of process.* Corporations cannot be served in the same manner as natural persons, but necessarily must be reached through officers or agents, and the method of making such service is invariably prescribed by statutes expressly passed for that purpose.

In reference to the case of Venner *vs.* Denver Union W. Co., 15 Colo. App., 495, counsel express the opinion that if the return on the original summons disclosed that neither an agent or stockholder could be found in the county the court would have held that if the second writ showed service on a duly authorized agent in another county, that the court obtained jurisdiction. We do not coincide in this opinion, and we desire to call attention to the fact that in none of the cases brought in the County Court was a summons ever placed in the hands of the sheriff of Ouray County nor does it appear that any attempt was made to serve a summons in that county. It is in the return of the sheriff of Ouray County on the *writ of attachment* in the Begole case alone, that we find the statement that he could find no one in his county upon whom process might be served.

TWO METHODS OF SERVICE.

Counsel for defendant in error claim that Section 499 Mills' Ann. Stats. prescribes a *method of service* upon foreign corporations differing from that prescribed by Section 38, Subd. 9th, of the Code, and co-existing with it. We submit that an examination of Section 499 will show that it simply provides for the *appointment* of an agent residing at the principal place of business of the corporation upon whom process may be served. The words "upon whom process may be served" obviously refer to the character of the agency. They certainly do not prescribe any method of service upon such agent. They mean that such agent may be served, but how served? obviously in the manner that may be prescribed by law.

If defendant in error's contention is correct, service may

be made under this statute without reference to time, place, manner of service or character of the action since there are no limitations contained in the act. The appointment of the agent is prescribed as a condition upon which the foreign corporation is permitted to do business in the State, yet it is contended that the authority of such an agent is not dependent upon the doing of such business. The act provides that the agent shall reside at the principal place of business, but as it does not say that he shall be served there, it is claimed that he can be served anywhere, no matter where he resides. No method is prescribed for the resignation of the agent or the revocation of his authority, so his authority must last during life or during his residence in the State and would revive upon his return, either permanently or temporarily, and any statement he may make that his agency has ceased is without avail. He can be served by any person, whether an officer, an infant, or even the adverse party to the action since the act is silent in this respect. In like manner the process need not be read or handed to him or left at his residence but might be sent through the mails. The corporation may have left the State yet any person may serve this agent and obtain a valid judgment regardless of whether or not he is a citizen of the State or the cause of action arose therein. These conclusions are absurd, yet they are irresistible if the contention that this act provides a *method of service* which is independent of the other statutes of the State is upheld. It cannot be the law that because an act prescribes that a certain person may be served and is silent about the time, place, manner and circumstances under which he may be served that service may be made upon him at any time, at any place, in any manner and under all circumstances, especially when there is an act which does prescribe the method of service as Section 38, Subd. 9, of the Code does in this case.

In the case of the Henrietta M. and M. Co. *vs.* Johnson, 173 U. S., 221, the corporation was doing business in Arizona, but had appointed no process agent. The statute of

Arizona provided that service on corporations *generally* might be made by serving certain officers or agents, and service was made on such an agent. It was contended that where there was a statute requiring the designation of a process agent, and prescribing the manner of service upon him, that such statute was exclusive, and if no such agent had been designated there could be no service upon the corporation. This Court held that the statute was not exclusive, and that the general law was broad enough to permit service upon the other officers and agents mentioned therein. We make no such contention in the case at bar. We do not claim that only a designated agent could be served, but we do claim that a designated agent as well as other proper agents or stockholders must be served in the manner and under the conditions prescribed in the only statute relating to service upon foreign corporations, viz., Section 38, Subdiv. 9, of the Code.

JARDINE HAD CEASED TO BE PROCESS AGENT AT THE TIME OF SERVICE.

He had removed from the county designated as the principal place of business, where both the Constitution of the State (Article XV., Section 10, quoted by counsel, on page 18, of their brief), and Section 499, Mills' Ann. Stat., required him to reside. The framers of the Constitution and the Legislature must have had some reason for restricting the appointment to persons residing at the principal place of business. It is evident that it was their intention to provide agents of this character should live at the place where the corporation may be said to reside. If this was the intention it would be defeated by the agent's removal. Counsel's argument that such a construction would destroy the efficiency of the act, because the corporation might not designate another agent, is met by the fact that Section 501 Mills' Annotated Statutes provides a penalty for default in com-

pliance therewith, and this penalty has been held by this Court to be exclusive in the case of Fritts *vs.* Palmer, 132 U. S., 282 (cited by counsel), the Court saying on page 289:

"So far as we are aware, the only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the State before acquiring the right to do so, is found in Section 262 of the same chapter (Gen. Stats. of Colo., Ch. 19), which provides: 'A failure to comply with the provisions in Sections 23 and 24 (Secs. 260 and 261) of this act shall render each and every officer, agent and stockholder in any such corporation, so failing therein, jointly and severaly, personally liable on any and all contracts of such Company made within this State during the time that such corporation is so in default.'

"The fair implication is that, in the judgment of the Legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that State.

"It is not for the Judiciary, at the instance or for the benefit of private parties, claiming, under deeds executed by the persons who had previously conveyed to the corporation, according to the terms prescribed for passing title to real estate, to include the additional and harsh penalty of forfeiting for the benefit of such persons the estate thus conveyed to the corporation and by it conveyed to others. * * * If the Legislature had intended to declare that no title should pass under conveyance to a foreign corporation before it acquires the right to engage in business in the State * * * that intention would have been clearly emphasized."

Section 260, above referred to, is Section 499 and Section 262 is Section 501 of Mills' Ann. Statutes.

The authorities cited by counsel hardly support his contention on this point.

Gibson *vs.* Ins. Co., 144 Mass., 81. In this case the corporation was still doing business in the territory, and it does not appear that notice of the termination of the agency was given before judgment, and it was held that service upon a designated agent, under these circumstances, was good, although, as between the Company and the agent, the agency

had ceased. There was no question raised of the disqualification of the agent under the statute.

Eureka Co. *vs.* Superior Court, 66 Cal., 311. The corporation was still doing business in California and the designated agent's authority had not been revoked, either in fact or on the record, and no contention was made that he was not such agent at the time of service. The case turned on the question of whether the statute of 1872, providing for service on designated agents, had been repealed by the Code by which other agents might be served, and it was held not repealed.

DOING BUSINESS.

It is contended that the ownership of property is the doing of business in the State, because the plaintiff in error was by its articles of incorporation authorized to own property. The case of Pennoyer *vs.* Neff has definitely settled the law to be that the existence of property in the State does not imply the presence of its owner there so that a judgment in personam may be rendered against him and be satisfied out of the property. It is true that the owner in that case was a natural person, but we can see no reason why the rule should be otherwise in respect to corporations. The mere ownership of unused property is not the doing of business either as commonly understood or in the sense of the words used in the statute. In St. Clair *vs.* Cox, The Winthrop Mining Company had owned property in the State which had been attached and sold by virtue of the very judgment which was held to be void in personam.

Mr. Justice Jackson in the case of U. S. *vs.* American Bell Telephone Co., 29 Fed. at pages 35, 36 (cited in original brief), says:

"It cannot be held sufficient to give this court jurisdiction in personam over a foreign corporation that it has property rights, however extensive, within the district, or that it has pecuniary interests, however valuable, in business managed and conducted by others. It must itself be carrying on

business in its own right, on its own responsibility, and for its own account, and through or by means of its own agents, officers or representatives, in order to bring it within the operation of the laws of a State other than that in which it is incorporated, making it amenable to suit there as a condition of its doing business in such State."

The case of Sullivan *vs.* Sullivan Timber Co., 103 Ala., 375 (cited by counsel) also holds that the mere ownership of property does not constitute the doing of business, the court saying:

"The real test is applied in Beard *vs.* W. & A. Publishing Co., *supra:* is the corporation engaged in the transaction of business, or any part thereof, it was created and organized to transact. If it be, it 'does business' within the meaning of the constitution. If it be not—if the act it is doing, or has done, is not within its general powers and franchises—it is not the business to which the constitutional requirement is directed.

"When the suit was commenced, the company had an agent or employe in the possession and care of the line of railroad it had constructed in the County of Conecuh, and of the machine it had used in the loading of cars with timber. The railroad and the machine were mere adjuncts or appurtenances to the saw mill it had operated in the County of Escambia. The operation of the mill had been suspended and the railroad and machine were unemployed. The care and protection of unused property, or the payment of taxes which are a charge upon the property, and the payment of which is essential to the preservation of the title to the owner, cannot be deemed the exercise of corporate powers or franchises, nor the transaction of the business, or any part thereof, for which the company was created and organized. These acts did not confer upon the courts of the county jurisdiction to entertain a personal action against the company."

Of course the property owned in the State can be reached by proceedings in rem and the corporation can be sued for this purpose if the statutes of the State so provide and in the manner provided by the statute and that is all that is meant by the authorities cited by counsel that say that a foreign

corporation can be sued if it has property in the State. Our contention here is simply that in order to obtain jurisdiction in rem the statute conferring such jurisdiction must be followed. If counsel's contention is correct it would be possible for any person, even a citizen of the State of Maine, to sue the corporation in Colorado long after it had ceased to transact business there, serve the person who had been its designated agent, obtain judgment and, disregarding the property in Colorado, enforce the judgment wheresoever he saw fit, for it would be in personam. We think it not unreasonable to say that if the legislature of Colorado had power to do this it should not be presumed to have done it unless its enactment was clear, express and unmistakable. There is no necessity for adopting such a construction because the property may always be reached in rem. It is to be observed that all of the authorities relied upon by defendant in error upon this point relate to the acquisition of property in the State, it being held that the act of acquiring property was the doing of business. This is a very different matter from the mere passive ownership of property. In none of the cases did the question of service arise.

PRESUMPTIONS.

It is contended that if it appears from the record that the foreign corporation has designated a principal place of business and a process agent in the State it will be presumed that it did business and was doing business there when service was made, and that in a case of this kind the doctrine announced in St. Clair *vs.* Cox does not apply. The actual doing of business, or actual presence of the corporation in the State *at the time of service* is the fact that confers jurisdiction, and jurisdictional facts that must appear affirmatively are not aided by presumptions. So said Mr. Justice Jackson in the case of the United States *vs.* The American Bell Telephone Company, 29 Fed., 17, 33. If it could be presumed that because a person or corporation was present

at a certain place ten years ago that he or it must be there now, such a presumption would certainly not be entertained in a case where it was necessary to show his presence there now, and the only showing made was that he had been there ten years ago. Such an allegation, under such circumstances, would, on the contrary, indicate that it could not be shown that he was present there now. If plaintiff in error was doing business in Colorado at the time these suits were brought why was it not so alleged, instead of alleging that it had intended to do business there and had appointed an agent and designated a place of business some ten years before ?

JUDGMENTS IN ATTACHMENT CASES CONSIDERED IN REM.

Counsel evidently do not understand our position with reference to the attachment cases considered as judgments in rem, as much of their long argument might otherwise have been spared. We admit that a Court can obtain jurisdiction over property in the State and render a valid judgment against it without a personal service upon its absent owner, but we deny that it can render a valid judgment against the property without notice, either personal or constructive, upon the owner, and we maintain that such notice must be given in accordance with the statute which provides for it. If the notice is by publication or by service outside the State, then it must be given as the statute directs. If it be personal within the State (conceding for the sake of the argument that the action is in rem), then it must conform to the provisions and be given under the conditions prescribed by the statute which provides for that kind of notice. We take the position that no notice was given in these cases in accordance with any statute of the State. No notice was given by publication, and the personal service on J. M. Jardine was void, because plaintiff in error was not shown to be doing business in the State, and because it was served out-

side the county of the action, and service upon him, under these circumstances and in this manner, was not permitted by the statute. There was, therefore, no notice such as the law requires.

Judgments in rem can be attached collaterally for lack of jurisdiction, too, as well as judgments in personam and due notice is one of the elements of that jurisdiction.

It may be conceded that where the record is silent as to notice the jurisdiction of the Court to render judgment against the *res* will be presumed in the case of collateral attack, but there can be no such presumption when the record discloses a void notice. This, in brief, is our position on this point and believe it to be sustained by the authorities cited in our original brief.

Cooper *vs.* Reynolds, 10 Wall., 108, does not hold that the service of a copy of the writ of attachment dispenses with the necessity of serving a summons, except in cases where the statute so specifically provides and the writ of attachment contains or is accompanied with a notice equivalent to a writ of summons. In that case this court had under consideration a judgment rendered in the State of Tennessee. The code of that State provided for publication of a notice in attachment, it provided further that this notice should contain the names of the parties, the style of the court, the alleged cause of attachment and the time and place where the defendant was required to appear and defend the attachment and it provided finally that the publication of this notice should be in lieu of personal service and that upon the return of the attachment duly levied the plaintiff might proceed as if suit had been commenced by summons.

It was conceded by the counsel in that case and understood by this court that in Tennessee the publication of this notice was in attachment suits to serve the purpose of original process to bring the defendant into court and to dispose with the necessity of publishing the summons.

It was not contended that there was no notice published,

but it was contended that the proof of publication did not comply with the requirements of the statute of the State. The notice actually published was missing from the files, but the records of the State court showed the order of publication and publication as made in the Knoxville Whig and the record recited that publication had been made according to law.

FOURTEENTH AMENDMENT.

It is not contended that statutes of Colorado provide a system of procedure that violates the Fourteenth Amendment in regard to "due process of law." The question presented here is that the courts have not complied with the laws of the State which guarantees due process of law, and have taken the property of plaintiff in error without obtaining jurisdiction over it, and have condemned and sold that property without lawful notice to plaintiff in error.

While this Court has refused to give any general definition of "due process of law," it has held in the case of Walker *vs.* Sauvinet, 92 U.S.,90, 93, that "due process of law," as used in the Fourteenth Amendment, means process of law as fixed by the State, provided, of course, that the law of the State does not conflict with the Federal Constitution. To the same effect we cite Hurtado *vs.* California, 110 U. S., 5-16, 535.

In Pennoyer *vs.* Neff this Court has said on page 733 that since the adoption of the Fourteenth Amendment the proceedings of a Court of Justice without jurisdiction over the person of the defendant in an action in personam can be questioned on the ground that they do not constitute due process of law.

It would be absurd to say that if the laws of a State do not violate the Fourteenth Amendment that the proceedings of its courts cannot be questioned on this ground, even though they show another disregard of the laws of the State and the principles which underlie them.

DEFENDANT IN ERROR AS AN INNOCENT PURCHASER.

We are not disposed to quarrel with the authorities cited by counsel under this head of their argument. It is no doubt true that an innocent purchaser at a judicial sale will be protected if the judgment is simply erroneous and has not been reversed, but if the judgment be void for lack of jurisdiction, it is a nullity and no one can acquire any rights under it.

The Supreme Court of Colorado in the case of Great West Mining Co. *vs.* Woodmas of A. Co., 12 Colo., 46, says on page 53:

"It was competent to show that the service of the writ and summons was not made upon a general agent of the defendant and that the entry of appearance by the attorney was unauthorized, and that no notice was given to the parties whose right was sought to be affected by such entry. It follows as a logical result of the propositions before discussed that a judgment rendered without service, or upon the unauthorized appearance of an attorney, is (whenever it is made to appear by proper proceedings instituted for this purpose) void, and that all sales or other proceedings had thereunder are, as to all persons, irrespective of notice or bona fides, absolute nullities."

If our argument has served any useful purpose it has shown that the judgments under which the property was sold were absolutely void for lack of jurisdiction, and that the sale was void for the same reason.

ATTACK ON SHERIFF'S SALE.

The sheriff's sale is a necessary link in the title of defendant in error. If it is void then the judgments, even if valid, would simply stand as judgments that had never been enforced. If defendant in error claims title through the judg-

ments, it is essential for him to show a valid sale under them.

The alleged prorating order, as we have said, is undated and unsigned, and, as it does not appear to have ever been entered or filed in the case, it is impossible to tell when it was placed among the papers in the Begole case. It was evidently drawn before the sale, as it orders the sheriff to make sale, but if it had been actually made by the Court it would have been made without jurisdiction, because Fulton was not a party to the suit, nor had he ever applied to be made a party. He had not invoked the jurisdiction of the Court in that case, and his claim was not a part of the subject matter involved therein. The sale was not merely erroneous. It must have been absolutely void, because the return of the officer shows, beyond question, that it was made, in part, under the void writ of execution in the Fulton case to satisfy the judgment in that case, which was void on its face for lack of jurisdiction.

Counsel are in error in regard to the facts disclosed by the record in the Fulton case, for they say that it shows a "levy of attachment on the same property in the same manner as in the other cases." (See top of page 111, defendant in error's brief.) An inspection of the record in the Fulton case will disclose no attempt to levy on any property whatever, but simply a service of the writ on J. M. Jardine (see record in Appendix to plaintiff in error's brief, pp. 128-136). Counsel are also in error in stating that the executions were special (see top of page 116 of their brief). The execution in the Fulton case was a general one. (Transcript, Folio 151.)

SUIT TO QUIET TITLE IN PERSONAM OR IN REM.

In addition to what has been said in our original brief in regard to the suit to quiet title as an action in personam, we deem it to be sufficient to say that the authorities quoted by

counsel simply hold that it is competent for a State to provide by statute for constructive service in suits to quiet title, and that in case of such constructive service the judgment is in rem. This doctrine we, of course, concede, but it has no reference to the case under consideration where the service was personal within the State.

FORM OF THE DECREE.

It is undoubtedly true that a State has power by statute to vest in its court jurisdiction to establish a title by the force of the decree itself in suits to quiet title to lands within its borders. The question here is, has the State of Colorado done this? It has enacted Section 255 of Mills' Annotated Code, which the Supreme Court has held to be merely a statutory declaration of the old chancery practice (Wall *vs.* Magnes, 17 Colo., 476). It has enacted Section 2535 Mills' Annotated Statutes, providing that in case of constructive service a trustee may be appointed to perform all acts that the decree required of the defendant. We see nothing in these acts that changes the rule announced in Hart *vs.* Sansom.

REJECTION OF EVIDENCE.

The plaintiff in error offered to prove that it was not doing business in Colorado at the time service was made upon J. M. Jardine as its designated agent. The court excluded the offer unless it should also prove that there was no designated process agent there. The court said: "That record (meaning the suit to quiet title) was admitted on the theory at least that the corporation consented to be served by serving the particular agent. The other records were admitted on the theory that it sufficiently appeared in the complaints that the corporation was doing business in Colorado." (See transcript, bottom of page 98.) Plaintiff in

error had appointed J. M. Jardine its process agent and his authority had not been revoked of record, there being no method of doing this provided by law. The question presented by the ruling of the court therefore is: Does the cessation of business by the corporation revoke the designated agent's authority to receive service of process, under the laws of Colorado? We maintain that his authority is revoked, while defendant in error's whole argument, when reduced to its last analysis, is that it is not revoked.

We admit that the State of Colorado can, by express statute, continue the authority of such an agent beyond the time when the corporation ceases to do business there, at least so far as all matters arising out of the transaction of business done there is concerned, and that this authority could be made to continue in reference to property acquired in the State. The authorities cited by counsel all fall within this undisputed doctrine.

But if the agency is to continue it must be made to do so by express statute. The power of the State over foreign corporations is purely statutory and the corporation has a right to know what liabilities it is assuming by doing business there and what powers it is conferring when it designates a process agent.

This point is so important to the determination of this case that we may be pardoned for indulging in some repetition.

There is certainly nothing in Section 499 of the Statutes that indicates that the authority of the agent is to be continued beyond the time of the doing of business in the State. Nothing is said about property or contracts in the State. It provides merely for the appointment of an agent. If, however, it could be implied or in any manner inferred that the agent's authority was to be continued beyond the doing of business the inference would be destroyed by the subsequent enactment of Section 38, Sub. 9, of the Code, which expressly limits service upon agents of foreign corporations to those corporations which are doing business in the State

and which has been so construed by the Circuit Court of Appeals in Rust *vs.* Water Works.

The authorities cited by us in sustaining our contention that, in the absence of statute otherwise providing, a designated agent's authority ceases with the cessation of business by the corporation are directly in point and have not been distinguished in any way from the case at bar. Forrest *vs.* Bridge Co., by the Circuit Court of Appeals for the Seventh Circuit; People *vs.* Commercial Alliance Insurance Company, by the Supreme Court of New York; Mutual Reserve Fund Life Ass'n *vs.* Boyer, by the Supreme Court of Kansas; De Castro *vs.* Telegraph Co., by Judge Lacombe in the United States Circuit Court in New York; Guthrie *vs.* Indemnity Association by the Supreme Court of Tennessee, and Graves *vs.* Posner, by the Supreme Court of Iowa, were all decided with special reference to designated process agents (see pages 72-79 our original brief) and they are, so far as we are advised, not opposed by any authority cited by counsel for defendant in error.

Respectfully submitted.

WILLIAM H. MOODY,
CARLTON M. BLISS,
Attorneys for Plaintiff in Error.

Of Counsel:
HURLBURT, JONES & CABOT.

JOHN A. PERRY,
GEORGE C. PRESTON.